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No. 90-698

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1990

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ALLENE FIELDS and EARINE DANIELS,  
*Petitioners,*  
v.

HALLSVILLE INDEPENDENT SCHOOL  
DISTRICT, ET AL.,  
*Respondents.*

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**Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**RESPONDENT HALLSVILLE  
INDEPENDENT SCHOOL DISTRICT'S  
BRIEF IN OPPOSITION**

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JOHN F. BUFE  
POTTER, GUINN, MINTON,  
ROBERTS & DAVIS, P.C.  
500 NCNB Center Tower  
Tyler, Texas 75702  
(903) 597-8311

*Attorneys for Respondent  
Hallsville Independent  
School District*

November 28, 1990

## QUESTION PRESENTED

In an employment discrimination action under Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act, both Petitioner school teachers complain that their employer, HALLSVILLE INDEPENDENT SCHOOL DISTRICT ("HISD"), discriminated against them by not offering them non-teaching positions in September, 1987 and in 1988 after the school district terminated both Petitioners from their teaching positions in August, 1986. Whether the Fifth Circuit Court of Appeals erred in upholding the decision of the District Court on grounds that Petitioners failed to apply for subsequent vacancies where Petitioners did not submit written employment applications, and where no non-teaching vacancies existed until September, 1987, over one year after Petitioners made their only verbal request to the HISD school board for transfer to non-teaching positions?

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND  
THE ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

Respondent, HALLSVILLE INDEPENDENT  
SCHOOL DISTRICT ("HISD"), respectfully files this its  
Brief in Opposition to the Petition for Writ of Certiorari  
filed by Petitioners Allene Fields and Earine Daniels.

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## INTRODUCTION

This is an employment discrimination action filed by two school teachers against HISD and various State Defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e), *et seq.* ("Title VII"), and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Petitioners were previously employed by HISD as special education teachers. After both Petitioners failed to pass the Texas Examination for Current Administrators and Teachers ("TECAT"), they were terminated by HISD during August, 1986. The teachers obtained right to sue letters from the Equal Opportunity Commission ("EEOC"). In their lawsuit, the teachers claimed that the Texas Education Agency, Texas Commissioner of Education, Texas State Board of Education, and the State of Texas (collectively the "State") chose a cut off score on the TECAT that worked to discriminate against them based on age and/or race. The teachers also claimed that HISD discriminated against them, subsequent to their termination, by failing or refusing to consider them for non-certified positions that became available the following school year.

HISD and the State Defendants each moved for summary judgment in the District Court. The District Court granted these motions finding, among other things, that the State was not the teachers' employer, and that the teachers had not applied for subsequent vacancies at HISD. Thereafter, the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's judgment in favor of HISD and the State Defendants.

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### STATEMENT OF THE CASE

Petitioner, Allene Fields, a 61 year old Black woman, had been employed by HISD for 14 years, while Petitioner, Earine Daniels, a 59 year old Black woman had worked for HISD for 11 years. Both obtained contracts for the 1986-87 school year conditioned upon passage of the TECAT examination. Teachers each took the TECAT twice, but failed on each attempt. As a result, Petitioners lost their licenses to teach in Texas.

After receiving their test results, Petitioners requested the HISD Board of Trustees ("Board") to waive the TECAT requirements so they could retain their teaching positions. On August 28, 1986, Petitioners appeared before the Board with their union representative. The union representative, on behalf of Petitioners, requested a waiver, or in the alternative, asked that Petitioners be considered for non-certified positions (positions not requiring passage of the TECAT), especially Teacher Aide positions. The Board denied the teachers' waiver request because it was not permitted by state law. However, the Board ordered the superintendent to write the teachers



"advising them that upon their successful passage of the TECAT examination, and if they so desire, they will be considered for future employment on an equal basis with other applicants in their field of preparation and experience." Teachers did not subsequently take or pass the TECAT.

At no time after the August 28, 1986 Board meeting did either Petitioner ever complete a written employment application with HISD for any non-teaching position, including Teacher Aide positions. The only "application" ever submitted by either Petitioner for non-teaching positions was in the form of the oral statements made by the union representative to the Board at its August 28, 1986 meeting. In a letter dated August 29, 1986 the Board superintendent informed both Petitioners of the decision of the Board not to seek a waiver on their behalf. In addition, the superintendent reported the resolution adopted by the Board "that upon [either Petitioners'] successful passage of the TECAT exam, and if they desire, they will be considered for future employment in the HISD on an equal basis with other applicants when vacancies occur in their field of preparation and experience."

During August and September, 1986 there were no vacancies for any non-certified positions for which either Petitioner would have been qualified. In this regard, no Teacher Aide positions within HISD were filled during calendar year 1986.

After Petitioners were terminated on August 29, 1986, the first Teacher Aide vacancies in HISD were filled on September 10, 1987, over one year after Petitioners'



terminations. In this regard, HISD hired two white females as Teacher Aides on September 10, 1987. In addition, a school office Aide position was filled on June 17, 1988 by a white female; two classroom Teacher Aide positions were filled on August 15, 1988 and September 6, 1988 by white females; and a Receptionist/Secretary position was filled on September 27, 1988 by a white female. With the exception of the vacancies listed above, no other vacancies occurred during 1986, 1987, or 1988 for which either Petitioner was qualified. Each candidate hired for the vacancies occurring in 1987 and 1988 listed above submitted a formal written HISD job application. Contrary to the statements at page 3 of the Petition, there is no evidence in the record that the individuals hired for these openings were "less-qualified" than Petitioners.

With the exception of the verbal statements made by their union representative at August 28, 1986 Board meeting, neither Petitioner ever made any further contact with the Board or the school district to express any interest whatsoever in any subsequent positions or openings at HISD. Besides not completing a written employment application, Petitioners never once wrote a letter of interest, never telephoned any HISD personnel, and never had any conversation with any HISD official after the August 28, 1986 Board meeting, to express interest in any HISD position.

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## REASONS FOR DENYING THE WRIT

Petitioners' allegations against HISD fall within the disparate treatment theory under Title VII and the ADEA. The standards generally applicable to claims of disparate treatment under Title VII and the ADEA were set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). See also, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 32 L.Ed.2d 207 (1981). One of the four elements that a Plaintiff must initially prove in a Title VII case is that the Plaintiff applied for a position for which she was qualified. Under some circumstances an oral application may be sufficient. See *Howard v. Summit County Welfare Dept.*, 525 F.Supp. 1084, 1089 (N.D. Ohio 1981) (oral application sufficient despite general policy requiring written application where one oral application had been previously accepted); but see *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063 (8th Cir. 1975) (oral application held insufficient).

In applying the *McDonnell Douglas* test, subsequent cases have established that a vacancy need not exist on the precise day of application; and that any vacancies within a reasonable time of application must be considered as well. *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70, 72 (9th Cir. 1980) (written application one month before vacancy sufficient where applicant had mailed follow-up letter); see also, *Phillips v. Joint Legislative Committee on Performance and Expenditure Review*, 637 F.2d 1014, 1030 (5th Cir.), cert. denied 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 243 (1982) (although exact date vacancy occurred was unclear, District Court erred in requiring that vacancy "exist on the precise date of application"); *Harrell*

*v. Northern Elect. Co.*, 672 F.2d 444, 449 (5th Cir.), cert. denied 459 U.S. 1037, 103 S.Ct. 449, 74 L.Ed.2d 603 (1982) (plaintiff who submitted written application in August 1974 was told that she would be considered for a clerical assignment when one became available, interviewed for a position in October 1974, but was turned down – held, plaintiff “applied for” October opening). Courts have also held that the longer the period of time between an application and subsequent vacancy, the greater the need to “follow-up” an application. See *McLean*, 624 F.2d 72. The duty to follow-up should be greater where in applicant has only made an oral inquiry. See *Farmer v. Washington Fed. Sav. & Loan Ass’n*, 488 F.Supp. 55, 57-58 (N.D. Miss. 1979) (oral application plus three follow-up calls held insufficient under circumstances).

In the case at bar, the undisputed facts establish that no vacancies of any kind existed for which Petitioners were qualified for over 12 months after their union representative verbally informed the School Board of the teachers’ interest in non-certified, non-teaching positions. Under these circumstances, the 5th Circuit and the U.S. District Court both correctly concluded that the teachers’ oral expression of interest, without any follow-up inquiry whatsoever, was insufficient as a matter of law.

No vacancy existed at the time Petitioners verbally expressed their interest in non-teaching positions at the Board meeting. Moreover, no vacancies arose within a reasonable time after the August 28, 1986 Board meeting. Although under certain circumstances a verbal employment application may be sufficient to satisfy the application requirement of *McDonnell Douglas*; HISD was not required to continually consider Petitioners for vacancies

occurring one and two years after their oral "application" at a school board meeting. Both the 5th Circuit and the U.S. District Court below correctly reached this conclusion where neither Petitioner ever contacted HISD again after the Board meeting to follow-up. No written applications were ever submitted, contrary to the established HISD practice of requiring written applications. No letters were sent expressing interest, and Petitioners made no other contact with HISD after the August 28, 1986 Board meeting to confirm their interest in any non-teaching position. Under these circumstances, the 5th Circuit correctly concluded that Petitioners did not apply for vacancies within the meaning of *McDonnell Douglas*.

In addition, the 5th Circuit correctly pointed out that the School Board's resolution acknowledging Petitioners' interest in future positions was conditional. The order of the Board stated that the teachers would be considered for future employment "upon passage of the TECAT examination and if they desire. . . ." In this way the Board's resolution required Petitioners to follow-up on their request by expressing their "desire" for future vacancies. However, subsequent to the Board meeting, Petitioners never indicated their desire to be considered for future vacancies in any way.

The Petition should be denied. There is no conflict of decisions among the circuits on the controlling issue of law presented in the Petition. Furthermore, the question presented as to HISD's liability is not of sufficient national importance to justify this Court's review. This case turns upon its own unique facts, and the application of settled law. Moreover, for the reasons set forth above, the decision of the 5th Circuit affirming the U.S. District

Court for the Eastern District of Texas is correct and should be upheld.

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CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN F. BUFE  
POTTER, GUINN, MINTON,  
ROBERTS, & DAVIS, P.C.  
500 NCNB Center Tower  
Tyler, Texas 75702  
(903) 597-8311

*Attorneys for Respondent  
Hallsville Independent  
School District*